LETCHUMY

v.

RAMADASON

HIGH COURT MALAYA, KUALA LUMPUR
LC VOHRAH J
[DIVORCE PETITION NO. 177 OF 1981]
5 JANUARY 1984

FAMILY LAW: *Order of maintenance - Application for rescission - Power of Court to grant maintenance - Conversion of respondent to Islam - Divorce granted on ground of desertion.*

The petitioner obtained her divorce from the respondent on the ground of desertion, and subsequently an order of maintenance. On the respondent's failure to comply with the order, the petitioner applied successfully for leave to issue an order of committal against the respondent. The respondent thereupon applied for rescission of the order of maintenance on the ground that according to Islamic law the petitioner had no right to claim maintenance as she had not converted to Islam on the conversion of her husband.

Held:
[1] The Court's power to grant maintenance to the wife in the case before the Court would have arisen from sub-section (2) of s. 51 of the Law Reform (Marriage & Divorce) Act, 1976, which applied where the divorce had been granted under sub-section (1) on the ground of the respondent's conversion to Islam.

[2] But in the case before the Court, divorce had been granted on the ground of desertion, and the Court's power to grant maintenance stemmed from the general power granted to the Court under s. 77.

[3] However, the provisions of s. 77 could not be made applicable to the respondent. The respondent was a Muslim and sub-section (3) of s. 3 precludes the operation of the provisions of s. 77 to a Muslim.

[Order of maintenance set aside]

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, ss. 3, 51, (2), 77, (2), (3)

For the petitioner - Y. Sivaloganathan
For the respondent - F. Goonting

JUDGMENT

LC Vohrah J:

This is an application on the part of the respondent for rescission of the order of the Judicial Commissioner made on 29 July 1982 directing the respondent to pay the petitioner, his former wife, the sum of RM200 per month as maintenance for herself.

The petitioner obtained her divorce from the respondent on the ground of desertion. The application for ancillary relief of maintenance was made by the petitioner on 17 February 1982 after the *decree nisi* had been pronounced on 1 December 1981 wherein it was ordered that the prayer for ancillary relief in respect of maintenance for the petitioner be adjourned to Chambers. After the *decree nisi* had been made final and absolute this question of

maintenance came to be considered in the presence of both the parties on 20 July 1982 when the Judicial Commissioner made the aforesaid order of maintenance to take effect retrospectively from 1 January 1982. The record shows that this order has never been complied with and that an application was filed by the petitioner on 10 January 1983 for leave to issue an order of committal against the respondent. Such leave was granted by the Court on 18 January 1983. The sequel to this is the present application by the respondent to set aside the maintenance order on the ground that the *fatwa* from the Mufti of the Federal Territory states *inter alia* that according to Islamic law the petitioner has no right to claim maintenance "because she has not converted into Islam with the husband within *eddah* period."

Both Counsel appear to be in agreement that the Court's power to grant maintenance to the wife in the present case arises from sub-section (2) of s. 51 of the Law Reform (Marriage & Divorce) Act 1976. That section reads:

> 51. (1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce:
>
> Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.
>
> (2) The Court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.
>
> (3) Section 50 shall not apply to any petition for divorce under this section.

In my view, sub-section (2) would only apply if the divorce had been granted to the petitioner under sub-section (1) on the ground of the respondent's conversion to Islam whereupon the Court upon dissolving the marriage could make provision for the petitioner. In the instant situation where the petitioner obtained her divorce not on the ground of conversion but on the ground of desertion *per se* the Court's power to grant maintenance must, in my option, stem from the general power granted to the Court by s. 77 which reads:

> 77. (1) The court may order a man to pay maintenance to his wife or former wife-
>
> (a) during the course of any matrimonial proceedings;
>
> (b) when granting or subsequent to the grant of a decree of divorce or judicial separation;
>
> (c) if, after a decree declaring her presumed to be dead, she is found to be alive.
>
> (2) The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.

That being the case any limitation to the application of the aforesaid provisions must be considered. This appears in s. 3 the relevant provisions of which read:

> 3.(1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.
>
> (2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.
>
> (3) This Act shall not apply to a Muslim or to any person who is married under Muslim law and no marriage of one of the parties which professes the religion of Islam shall be solemnised or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a

decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other written law to the contrary, be valid against the party to the marriage who has so converted to Islam.

(4) ...

...

As I see it, sub-section (3) precludes the operation of the provisions of s. 77 to a Muslim and as the respondent is now a Muslim I do not think they can be made to apply to him. It would have been different if the divorce had in fact been granted under s. 51 on the ground of the respondent's conversion to Islam. In that case the Court would have been enabled by the specific provisions of sub-section (2) to make provision for the petitioner's maintenance.

In the premises I hereby set aside the order of the Judicial Commissioner as prayed by the respondent.

Also found at [1984] 1 CLJ 265